

Michael E. Kreger, Esq.
MKreger@perkinscoie.com
Perkins Coie LLP
1029 W. Third Avenue, Suite 300
Anchorage, Alaska 99501
(907) 279-8561
(907) 276-3108 (Facsimile)

Attorneys for Plaintiff
MWH Americas, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MWH AMERICAS, INC.,
a California corporation

Plaintiff,

v.

NORTH SLOPE BOROUGH,

Defendant.

Case No. _____

COMPLAINT

COMES NOW plaintiff MWH Americas, Inc. ("MWH"), by and through its attorneys, Perkins Coie LLP, and for its complaint against defendant North Slope Borough ("NSB") alleges as follows:

1. Plaintiff MWH is a California corporation with its principal place of business in Broomfield, Colorado and is in all ways qualified to bring this action.
2. Defendant NSB is a political subdivision of the State of Alaska.

3. NSB does business in the State of Alaska and is amenable to personal jurisdiction in this State.

4. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

5. This court has original jurisdiction pursuant to 28 U.S.C. 1332(a) based on diversity of citizenship between plaintiff and defendant.

ALLEGATIONS COMMON TO ALL COUNTS

6. On April 23, 2013, MWH and NSB entered into a Professional Services Agreement—Design Professional (“Agreement”) wherein MWH agreed to provide designated professional design services in connection with the design and construction of a new water plant and wastewater treatment plant project to be owned and operated by NSB. This project is referred to in the Agreement as New SA-10 Water and Waste Water Treatment Plant (the “Project”).

7. In the Agreement, in exchange for MWH’s professional services, NSB agreed to pay MWH an amount, as amended, not to exceed the sum of \$7,740,621 (“Contract Price”).

8. During the term of the Agreement, NSB retained a construction management firm, ARCADIS US, Inc. (“ARCADIS”) to provide owner representation services to NSB.

9. The term of Agreement expired on May 31, 2016.

**COUNT I
BREACH OF CONTRACT**

10. Plaintiff incorporates by reference paragraphs 1-9 as if fully set forth herein.

11. In Article 4.1(A) of the Agreement, NSB agreed to pay for MWH's services "monthly upon invoicing and [such payment] shall be in proportion to services performed within each phase of services on the basis set forth in EXHIBIT B."

12. MWH performed designated professional design services under the Agreement.

13. MWH invoiced NSB by submitting progress payment applications ("invoices") during the term of the Agreement for the services MWH performed.

14. At the request of NSB, and as part of its scope of services as owner's representative, ARCADIS received and reviewed MWH's invoices and made recommendations to NSB for payments to MWH, including invoices #1696741, #1696751, #1698503, #1698504, #1700769, and #1703222 (collectively the "Unpaid Invoices").

15. Pursuant to Exhibit B, Section 3 of the Agreement, if NSB objected to any invoices or portions thereof submitted by MWH, the undisputed portion of the invoice was to be paid.

16. Without objecting to any services submitted for payment in the Unpaid Invoices, and without paying undisputed portions of the Unpaid Invoices, NSB failed to pay the Unpaid Invoices for services performed on the Project.

17. NSB breached the Agreement in that NSB has failed to pay the Unpaid

Invoices in the invoiced amount of \$795,448.32.

18. MWH has been damaged in an amount in excess of \$795,448.32, plus allowable interest and service charges, as a result of NSB's breach of the Agreement.

COUNT II
BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

19. Plaintiff incorporates by reference paragraphs 1-18 as if fully set forth herein.

20. In 2015, NSB, through its owner's representative, ARCADIS, sent letters and emails to MWH stating NSB's view that MWH was "financially responsible" to NSB for payments made by NSB to its general contractor on the Project and requesting that MWH agree to a reduction in the Contract Price on account of payments by NSB to its contractor.

21. Beginning on or about November 27, 2015, NSB, in breach of its contractual obligations, began withholding payment to MWH on the Unpaid Invoices.

22. After numerous MWH inquiries in 2015, on January 6, January 21, and January 25, 2016, NSB advised MWH that all Unpaid Invoices were under review by NSB.

23. On January 25, 2016, NSB advised MWH that "the only reason [the Unpaid Invoices] have not been paid is Chris Brown has refused to speak with us" regarding NSB's requested reductions in the Contract Price.

24. Thereafter, on February 12, 2016, NSB told MWH that NSB was refusing to pay the Unpaid Invoices because MWH's invoices were received more than 30 days after the services had been performed.

25. Prior to and after February 12, 2016, NSB, through its representative ARCADIS, received, reviewed, and recommended to NSB the payment of MWH invoices that were invoiced more than 30 days after the service was performed.

26. Prior to and after February 12, 2016, NSB made payments for services that were invoiced more than 30 days after the service was performed.

27. On March 15, 2016, NSB, through its representative ARCADIS, wrote to MWH to advise that NSB was “considering” terminating the Agreement with MWH for cause.

28. NSB’s threat on March 15, 2016 to terminate the Agreement with MWH for cause was made to coerce MWH to agree to reductions in the Contract Price and to cause MWH to agree to provide on-site professional advisory services not required by the Agreement.

29. NSB owed MWH a duty of good faith and fair dealing in the performance of the Agreement.

30. NSB breached its duty of good faith and fair dealing owed to MWH in that:

- a. NSB failed to timely review the Unpaid Invoices in good faith.
- b. NSB failed to pay MWH for undisputed portions of the Unpaid Invoices.
- c. NSB asserted false and inconsistent defenses to its obligations to make payments to MWH without a right to do so under the Agreement.
- d. Without cause, NSB threatened to terminate the Agreement in order to

coerce MWH to agree to a reduction in the Contract Price and to compel MWH to perform professional services not required by the Agreement.

31. MWH has been actually damaged in an amount in excess of \$795,448.32 as a result of NSB's breaches of the duty of good faith and fair dealing.

**COUNT III
VIOLATION OF THE UNFAIR TRADE PRACTICES ACT**

32. Plaintiff incorporates by reference paragraphs 1-31 as if fully set forth herein.

33. NSB is engaged in trade or commerce.

34. NSB engaged in unfair and/or deceptive trade practices under AS 45.50.471 when, in an attempt to coerce MWH to agree to a reduction of the Contract Price:

- a. NSB, without cause, failed to pay MWH for undisputed portions of the Unpaid Invoices.
- b. NSB asserted false and inconsistent defenses to its obligations to make payments to MWH.
- c. NSB, without cause, threatened to terminate the Agreement.

35. NSB engaged in unfair and/or deceptive trade practices under AS 45.50.471 when NSB, without cause, withheld money owed to MWH to compel MWH to perform professional services not required by the Agreement.

36. As a result of NSB's violations of the Alaska Unfair Trade Practices Act, pursuant to AS 45.50.531-.537, MWH is entitled to an award of three times the amount of its

actual damages of \$795,448.32, plus interest, and its allowable litigation costs and full reasonable attorneys' fees at the prevailing reasonable rate.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for relief as follows:

1. For judgment in an amount in excess of \$795,448.32, plus accrued interest and treble damages as provided by law, the final amount to be proven at trial.
2. For awards of costs and attorneys' fees as provided by law.
3. For such other relief as the court may deem just.

DATED: September 13, 2016

PERKINS COIE
Attorneys for Plaintiff
MWH Americas, Inc.

By s/ Michael E. Kreger
Michael E. Kreger, Alaska Bar No. 8311170
MKreger@perkinscoie.com
PERKINS COIE LLP
1029 W. Third Avenue, Suite 300
Anchorage, Alaska 99501
(907) 279-8561
(907) 276-3108 (Facsimile)